LIBRARY
SUPREME COURT, U. S.

FILED
NOV 22 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 776

THE NATIONAL COMMITTEE OF GIBRAN, also known as THE COMITE NATIONAL DE GIBRAN, representing the Town of Becharre, Lebanon,

Petitioner,

v.

GEORGE G. SHIYA,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH M. CUNNINGHAM,
Attorney for
George G. Shiya, Respondent.
67 Wall Street,
New York, N. Y. 10005.

PHILIP G. REILLY,
Counsel,
217 Broadway,
New York, N. Y. 10007.

TABLE OF CONTENTS

PAGE

Statement 1

POINT I—No question of whether federal or state law applied was raised in the District Court or in the Court of Appeals. Both parties agreed there was no conflict and that a well established general law applied 2

POINT II—There is no significant difference in the law applied by the various states and by federal courts concerning interpretation and rules of construction of attorneys' contingent fee contracts. The law of the State of New York does not differ from that applied by other states and by federal courts 6

A. Although the verbal formula may differ from case to case, there exists a well settled general law concerning a court's right to oversee an attorney's fee in a contingent retainer where fraud is present or the retainer is unconscionable 6

B. The same general law applied in New York is similarly applied in other jurisdictions 11

POINT III—There is no conflict between the law of New York and "Federal law" with regard to the interpretation and construction of retainers said to be ambiguous 14

PAGE

POINT IV—Contrary to the rules of this Court, the the petitioner merely seeks a review of the opinion of the Court of Appeals on its interpretation of the testimony, letters and documents which make up the surrounding circumstances of the 1956 retainer 24

A. The trial and results in the District Court .. 24

Conclusion 31

TABLE OF CASES

Bengoechea Macias v. De La Toree and Ramirez, 84 Fed. 2d 894 (1st Cir. 1936) 11, 12, 13

Byram v. Miner, 47 F. 2d 112 (1931), cert. den. 283 U. S. 854 8

Ellis v. Dixon, 349 U. S. 458 (1954) 4

Gair v. Peck, 6 N. Y. 2d 97 (1959), appeal dismissed and cert. den. 361 U. S. 374 .....6, 7, 8, 9, 12

Gibran v. The National Committee of Gibran, 153 Fed. Sup. 854 (1957) 29

Gray v. Joseph J. Brunetti Construction Co., 266 Fed. 2d 809 (3 Cir. 1959), cert. den. 361 U. S. 826 .....11, 12

Hawke v. Dorf, 148 App. Div. 326 (1911) 22

In re Smith's Will, 11 Misc. 2d 170 (1958) 22

In re Vaupel's Estate, 37 N.Y.S. 2d 853, affirmed 266 App. Div. 723 (1942) 23

La Monte v. Shapiro, 254 N.Y.S. 2d 887 (1964) 6

Lehigh v. N. E. R. Co. v. Finnerty, 61 F. 2d 289 (1932), cert. den. 287 U. S. 668 8

Mackey v. Passaic Stone Co., Inc., 36 N.Y.S. 2d 232, Queens County, Supreme Court, 1942 .....20, 21

PAGE

Massachusetts & So. Constr. Co. v. Township of Gills Creek, 48 Fed. 145 (1891), app. dismissed 154 U. S. 521 8

Matter of the City of New York, 148 Misc. 488, at page 495, aff'd 239 App. Div. 775 (1933) 2

Matter of Kuflik, 342 Fed. 2d 421 (1965) 8, 9

Matter of Mason, 174 Misc. 218 7

Matter of Schanger, 7 A. D. 2d 275, affirmed 8 N. Y. 2d 972 17

McAvoy v. Schramme, 238 App. Div. 225 (1933), affirmed 263 N. Y. 648 (1933, no opinion) ..18, 19, 21, 23

Needelman v. United States, 362 U. S. 600 (1959) 5

Powell v. Pennsylvania Railroad Co., 267 Fed. 2d 241, 3 Cir. (1959) 8

Race v. Harris, 246 App. Div. 367 (1936) 23

Ransom v. Ransom, 147 App. Div. 835 (1911) 6

Rice. v. Sioux City Cemetery, 349 U. S. 70, 77 (1954) 5

Ridge v. Healy, 251 Fed. 798 (8 Cir. 1918) 23

Samuels v. Simpson, 144 App. Div. 466 (1911) 22

Sea Isle Foods Inc. v. State, 40 Misc. 2d 872 (Court of Claims), 244 N.Y.S. 2d 613 6

Seligson, Morris v. Fairbanks Whitney Corp., 22 App. Div. 2d 625 (1965) 15, 16

Shiya v. National Committee of Gibran, 381 F. 2d 602, 1967 .....9, 11, 13, 14, 15, 16, 19, 21

Silverman v. Sunrise Pictures Corp., 273 F. 909 (2 Cir. 1921) 29

Spanos v. Skouras Theatres Corp., 364 Fed. 2d 161, cert. den. 385 U. S. 986 (1966) 11

Unterberg v. Therm-air Mfg. Co. Inc., 14 N. Y. 2d 859 (1964), reversing 20 A. D. 2d 260 (First Department) 18, 23

PAGE

Vans Agnew v. Fort Myers Drainage Dist., 69 F. (2d) 244 (5 Cir. 1934) 23

STATUTES CITED

New York Judiciary Law, Section 474 .....2, 6, 7

New York Judiciary Law, Section 475 (1b, 46b) 25

IN THE

Supreme Court of the United States

No. 776

THE NATIONAL COMMITTEE OF GIBRAN, also known as THE COMITE NATIONAL DE GIBRAN, representing the Town of Becharre, Lebanon,

Petitioner,

v.

GEORGE G. SHIYA,

Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

Statement

The petition for certiorari attempts to create questions from issues which never existed in this litigation either in the District Court or in the Court of Appeals. Indeed, such issues were not raised by either side until raised in the petition.

The questions contained in the petition are frivolous and induced by the petitioner's realization that the only real issues decided below were disputed questions of fact and of contract interpretation. All such issues were decided against petitioner by former Chief Judge Ryan of the Southern District of New York and by the Court of Appeals.

Whether federal or state law applied to any issue was never raised in the courts below. Both parties agreed that

federal and state law were the same on the issues involved. Both parties agreed that the law on interpretation of attorneys' contingent fee contracts is virtually the same in all jurisdictions, both federal and state.

The most appropriate statement in New York law describing the attitude of the petitioner is found in *Matter of the City of New York,* 148 Misc. 488, at page 495; aff'd 239 App. Div. 775 (1933), where the court said:

> "It is not infrequent for clients to show a willingness to accept the full benefits of attorneys' successful efforts who have been retained upon a contingent basis and attempt to repudiate a contingent agreement because the result of the litigation exceeded their expectations."

POINT I

No question of whether federal or state law applied was raised in the District Court or in the Court of Appeals. Both parties agreed there was no conflict and that a well established general law applied.

Attorney George G. Shiya sought relief in the District Court pursuant to the Judiciary Law of the State of New York to recover his fee earned after 12 years of litigation.*

---

* The relevant portions of Section 474 of the New York Judiciary Law are:

> "The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law, except that no agreement made hereafter between an attorney and a guardian of an infant for the compensation of such attorney, dependent upon the success of the prosecution by said attorney of a claim belonging to said infant, or by which such attorney is to receive a percentage of any recovery or award in behalf of such infant or a sum equal to a percentage of any such recovery or award, shall be valid or enforceable unless made as hereinafter provided. * * *"

The entire structure of the petition is based on an assertion that although the petitioner requested that the District Court apply New York rather than Federal law, Chief Judge Ryan refused to apply New York law. In fact, petitioner never once requested that State law be applied either in its brief on trial or in its brief or oral argument to the Court of Appeals. Neither Judge Ryan nor the Court of Appeals refused to apply New York law.

The most obvious attempt by the petitioner to create an unfounded issue as a basis for granting certiorari is the truncated quotation from Judge Ryan's colloquy, at page 17 of the petition. Judge Ryan made this statement after the evidence had been completed, and before closing argument. It was made without a request by either party.

Immediately after stating that he would be guided by Federal law, Judge Ryan continued, in the same paragraph:

> "However, *I think the Federal Law on this is substantially as set forth in the New York State Judiciary Law* and that the jurisdiction of this Court is for the fixation of fees earned in the particular litigation filed in this Court and does not extend to other matters and does not extend to the enforcement of a general attorney's lien." (Emphasis added) (116b)

Mr. Sams, attorney for petitioner in this Court, who was also trial counsel, did not disagree with Judge Ryan but rather indicated agreement with the trial court's statement by merely saying:

> "Mr. Sams: Thank you, your Honor."

There is not one word in the many briefs submitted in the District Court on the question of whether Federal and State law should govern any issue. Nowhere in any brief in the Court of Appeals was any reference made, in any context, to the claim that the District Court "erred" in applying federal law. Petitioner realized then as it

does now that no question was before the lower courts on this subject. Petitioner's position in the District Court and in the Court of Appeals was that interpretation and rules of construction of attorney client contracts were treated in the same manner by federal and state authorities.*

Both parties in the District Court and in the Court of Appeals relied on New York cases. The decision of Chief Judge Ryan and opinion of the Court of Appeals were made after examining briefs in which New York cases were in the great majority. These briefs made no claim or even an oblique reference to any question of whether federal or state law should be applied to any issue.

In *Ellis* v. *Dixon*, 349 U. S. 458 (1954), this Court dismissed a writ of certiorari as being improvidently granted where an issue of constitutionality had not been properly raised below. The reasoning of the *Ellis* case applies here.

---

* In addition to the fact that petitioner never alluded to a question of choice of law in the courts below, proof of lack of such question may be found in the cases cited to the courts below.

In respondent Shiya's trial brief was cited, Section 474 of the New York State Judiciary Law; 18 New York cases, 3 United States Court cases on general law, 1 Federal case which referred to the application of New Jersey law and 1 case from another state (New Jersey).

In the petitioner's brief in the District Court: the New York Judiciary Law was also cited, there were 31 New York cases cited for various points; 8 Federal cases citing general law and 4 cases of other states.

In respondent Shiya's brief in the Court of Appeals: The New York State Canons of Legal Ethics, 17 New York cases, 2 United States cases citing general law, 1 Federal case referring to New Jersey law and 4 cases from other states.

In the brief of the petitioner in the Court of Appeals: The New York Canons of Ethics; an extract from the New York State Bar Journal, 9 New York cases and 7 Federal cases, as well as quotations from authors Corbin and Williston, and from the Restatement of the Law of Contracts.

The claim of public importance in the petition is actually a verbal smoke screen. The record below is bare of any basis for such claim. The petition is merely an attempt to obscure the fact that all that is involved in this case are academic and episodic issues. The petition has attempted to manufacture a surface appearance of national importance. *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 77 (1954).

Certiorari should be denied when the record does not present the questions tendered in the petition. *Needelman* v. *United States*, 362 U. S. 600 (1959). It is the primary business of the courts of appeal to make a final determination of questions of fact and law relating to issues in cases where no national importance is involved.

POINT II

There is no significant difference in the law applied by the various states and by federal courts concerning interpretation and rules of construction of attorneys' contingent fee contracts. The law of the State of New York does not differ from that applied by other states and by federal courts.

A.

Although the verbal formula may differ from case to case, there exists a well settled general law concerning a court's right to oversee an attorney's fee in a contingent retainer where fraud is present or the retainer is unconscionable.

In further support of the petition's theme that the petitioner was prejudiced by the "refusal" of the courts below to apply New York law, the petition seeks to give the impression that New York Courts are more likely to refuse to enforce a contingent fee retainer which is "unreasonable" than do other states. The conclusion of the petition is, therefore, that had New York law been applied, the

Shiya retainer would have been disallowed. Actually, the law of the State of New York on this point is similar to the general law applied in all other jurisdictions.

The principal case relied on by the petitioner for this proposition is *Gair* v. *Peck*, 6 N. Y. 2d 97 (1959), appeal dismissed and cert. den. 361 U. S. 374.

The *"Gair"* case held that the New York Supreme Court had the power to promulgate and enforce a schedule of fees governing contingent fee retainers in personal injury and wrongful death cases. The need for such schedule came about because in the New York negligence field the remuneration of the contingent fee lawyer had become magnified whereas the risk of loss to the lawyer was being continuously reduced.

In the *"Gair"* case, the New York Court of Appeals held that the schedule of contingent fees was not intended to and did not in fact regulate attorneys' fees in any different manner than did Section 474 of the New York Judiciary Law (p. 2 note). In its opinion, after pointing out (6 N. Y. 2d 97, at page 106) that a contingent fee may be examined if it is all out of proportion to the value of the professional services rendered (quoted at p. 20 of petition) the court made it clear that the word "unreasonable" was being used in the sense of "unconscionable", for as the court said, "It matters little whether under such circumstances the formula be that the size of the fee becomes 'unconscionable' or 'unreasonable'. Each word means the same thing in this context."

The New York Court of Appeals in *"Gair"* was fully familiar with the many cases construing the New York Judiciary Law Section 474 to mean that a retainer contract is valid in the absence of fraud or mistake; see for example, *Ransom* v. *Ransom*, 147 App. Div. 835 (1911) and *Sea Isle Foods Inc.* v. *State*, 40 Misc. 2d 872 (Court of Claims), 244 N.Y.S. 2d 613. The same rule persists in New York Law after the *Gair* opinion was written. *La Monte*

v. *Shapiro*, 254 N.Y.S. 2d 887 (1964). This familiar rule is firmly rooted in American Jurisprudence sec. 7 C.J.S. sec. 186 (p. 1062). The "*Gair*" opinion demonstrates such familiarity for it uses words to explain its meaning throughout its opinion as "unfair advantage", "fraud", "unlawful", "oppression and overreaching", "so excessive as to become unconscionable as a matter of law". In each instance the "reasonableness" of the retainer is tested at the time of making not after an unforeseen event gives both client and attorney a greater amount than originally contemplated.

The petitioner would ignore the fact that *Gair* v. *Peck* was not meant to and did not have any effect on the well-established New York law as expressed in *Matter of Mason*, 174 Misc. 218 (Surrogate's Court, Kings County, 1940), where the court said at page 222 in discussing a lawyer's retainer.

> "Since both of the parties were competent adults, it was open to them to fix this remuneration in advance, and in the absence of inequitable dealings in the inception of the contract, a court of general jurisdiction would presumably enforce it according to its terms (*Ward* v. *Orsini*, 243 N. Y. 123, 127; *Rodkinson* v. *Haecker*, 248 N. Y. 480, 489; *Matter of Pagnatta*, 161 Misc. 415, 418, 419; *Matter of Dugan*, 147 Misc. 776, 780; *Matter of Merrill*, 165 Misc. 295, 296), since, as a general principle, the courts will not concern themselves with the terms of a contract if fairly attained."

Section 474 of the New York Judiciary Law (See note 1, p. 2) expresses the same New York Law.

The schedules of the New York Supreme Court referred to in the "*Gair*" case, of course, applies only to contingent fee contracts in negligence cases and contrary to the implication in the petition, any fee of 25% of an amount over $25,000 is approved by this schedule regardless of the

amount involved or the manner in which the fee was earned, always absent fraud or overreaching on the part of the lawyer.

Diligent research has failed to disclose any case in any jurisdiction which differs from this general rule. It is true that not all courts use the same rules to formulate the rule. Some courts may use "exorbitant," "unfair advantage," some courts may use the word "unreasonable" to mean unconscionable as did the *Gair* v. *Peck* opinion.

Because of the posture of the law, it is very understandable that federal opinions in this area do not labor over choice of law nor refinements in the verbal formula of unconscionable, unreasonable, unfair, etc.

For instance, most of the federal cases cited by the petitioner, page 19, note 14 of the petition, apply the law of the state in which the Federal court was sitting. However, all of these cases make reference to the same general rules of law pertaining to the construction of contingent fee contracts whether the opinion cites local state law or cases from other sources. (See, for example, *Powell* v. *Pennsylvania Railroad Co.*, 267 Fed. 2d 241, 3 Cir. (1959).)*

The decisions in the Court of Appeals for the Second Circuit are fully in accord with the law of New York and, therefore, with the general law. In *Matter of Kuflik*, 342 Fed. 2d 421 (1965), the same Chief Judge Ryan, who was trial judge in this case, refused to award an attorney an amount due under a contingent fee retainer because that attorney had been disbarred for conduct unconnected with the work he had done in the *"Kuflik"* matter. The Court

---

* Of the cases cited by petitioner at note 14, page 19, none went to this court. In three cases, unsuccessful attempts were made, *Lehigh* v. *N. E. R. Co.* v. *Finnerty*, 61 F. 2d 289 (1932), cert. den. 287 U. S. 668; *Byram* v. *Miner*, 47 F. 2d 112 (1931), cert. den. 283 U. S. 854; *Massachusetts & So. Constr. Co.* v. *Township of Gills Creek*, 48 Fed. 145 (1891), app. dismissed 154 U. S. 521.

of Appeals reversed and ordered the District Court to allow the disbarred attorney to recover his fee. In its opinion (342 Fed. 2d 421, 422), the Court carefully pointed out that "Among the grave responsibilities that must be shouldered by judges is that of the supervision of the administrative processes of judicature lest, though it would appear that justice is done, injustice result, and we do not disapprove of the interest shown by the judge below in making inquiry into the retainer arrangements Boucher had with his lawyers. Nevertheless, no overreaching and no fraud in those arrangements were discovered. . . ."

It is significant that in *Kuflik* as in the *Shiya* case, the Court found no need to cite any cases for these general propositions which were clearly sound and fully in accord with New York law as enunciated in *Gair* v. *Peck*, 6 N. Y. 2d 97 (1959), cert. den. 361 U. S. 374.

Although petitioner makes bald assertion that the courts below ignored New York law and the usual rule of "reasonableness", the courts below fully appreciated and followed the general rule of law in New York and other jurisdictions as is evidenced by the following:

(1) Judge Ryan permitted extensive cross-examination of Mr. Shiya on the claim made by the petitioner committee that Mr. Shiya was guilty of fraud, overreaching and breached legal ethics and that the retainer was consequently unconscionable before reaching the conclusion that

> "As to the contention that Mr. Shiya was disloyal to his clients, was guilty of any breach of profession or ethics, or guilty of unprofessional conduct, I also find there is no evidence to sustain that whatsoever. I think that everything he did here, as I look at it, was done with the idea of protecting to the very utmost the interests of his clients. He did so wisely, skillfully, and entirely ethically and professionally." (11a)

And in Finding of Fact 10 (15a), Judge Ryan found,

> "* * * Petitioner performed valuable legal services extending over twelve years which finally resulted in a judgment assigning said renewal copyrights to the Respondent."

(2) Although Judge Ryan, without urging by either party, advised the attorneys that jurisdiction being ancillary, he would be guided by federal law, he made it clear that such law was nevertheless exactly the same as the law of New York State. No objection was raised to Judge Ryan's comment. Indeed, petitioner's experienced trial lawyer agreed with the statement on the trial and never took issue with it until the issue was manufactured for the petition.

(3) Chief Judge Ryan had before him an extensive affidavit of services prepared by Mr. Shiya containing a recitation of the amount of legal work done in the Gibran litigation. This affidavit of services was used by the petitioner's trial counsel in cross-examination of Mr. Shiya and was before the court at all times (1b-46b).

(4) The courts below had before them many New York cases as well as federal cases and cases from other states, all of which referred to the same general law. These cases were cited by both parties without any intimation any choice of law question existed.

(5) The Court of Appeals was careful to indicate in its opinion that even if there had been no contract between the respondent, Shiya, and the petitioner, the fee of 25% of the value of the petitioner's recovery in the Gibran litigation, if considered in *quantum meruit*, would have been reasonable and not extravagant.

(6) The Court of Appeals for the Second Circuit is fully familiar with the problems which may arise because of a

conflict between Federal and State law. In a case decided *en banc* only 9 months before the argument of the *Shiya* case, the Court of Appeals for the Second Circuit in *Spanos* v. *Skouras Theatres Corp.*, 364 Fed. 2d 161, cert. den. 385 U. S. 986 (1966), considered a diversity case in which a plaintiff lawyer sought recovery in *quantum meruit* for legal services. The District Court found for the plaintiff lawyer. On appeal, the Second Circuit Court originally reversed with a dissent by Judge Friendly. The reversal was based on the fact that the New York Penal Law forbids a recovery of a fee for services rendered by a lawyer who is unauthorized to practice law in New York. Thus, the Court of Appeals in *Spanos* originally held that New York law controlled. On reconsideration *en banc* the District Court judgment was affirmed, in an opinion by Judge Friendly, which held that no state may prohibit a citizen with a Federal claim or defense from engaging an out of state lawyer to collaborate with a New York lawyer. Consequently, it was found necessary under the *Spanos* circumstances that New York law yield. It is difficult to understand how anyone can claim that the Court of Appeals for the Second Circuit was insensitive to state interests at the time of the *Shiya* appeal in view of its then recent holding in the *Spanos* case.

B.

The same general law applied in New York is similarly applied in other jurisdictions.

Petitioner cavalierly states that some jurisdictions are not in accord with the familiar rule requiring judicial interpretation of unconscionable, unreasonable and unfair attorneys' fees. Petitioner cites (note 17, p. 20) and discusses (p. 23) the cases of *Gray* v. *Joseph J. Brunetti Construction Co.*, 266 Fed. 2d 809 (3 Cir. 1959), cert. den. 361 U. S. 826 and *Bengoechea Macias* v. *De La Torre and Ramirez*, 84 Fed. 2d 894 (1st Cir. 1936). Both these cases follow the same general rule.

Gray was a diversity case to enforce a contingent fee contract for legal services which has been rendered before the Federal Housing Administration. In the *Gray* case, the Court found the retainer unambiguous. That the contract was fairly made. That since the plaintiff lawyer was not a member of the New Jersey bar the district court could not reduce the fee as might be allowed, under some circumstances by New Jersey law. The Court of Appeals for the third circuit observed that under New Jersey law that "attorney-client contracts for contingent fees * * * should not be carved away by the court except in an entirely clear case. * * * and in the absence of unfairness or fraud where there had been performed by the attorney the contract * * * ought not to be disturbed by the court but the parties should be left where they have placed themselves" (266 Fed. 2d 809 at p. 818). For this familiar proposition of law, the court in the *Gray* case cited New Jersey cases. It could just as well have cited New York cases for as pointed out above New York and New Jersey law are the same on this point.

The refusal of the court in the *Gray* case to "carve away" a contingent fee contract except in a "clear case" is merely another way for a court to state the verbal formula which had been held equivalent to unfairness or fraud, overreaching and consequent unreasonableness in *Gair* v. *Peck, supra.*

Petitioner cites the *Bengoechea Macias* (*supra*) case along with Gray for the proposition that some courts refuse to inquire into the reasonableness of an attorney's fee. In *Bengoechea Macias,* the attorneys sued to recover for legal services based on an account stated and on *quantum meruit.* The district judge found that the client had agreed to the account. The client asked the Court of Appeals to hold that the lower courts were in error on questions of fact. But the appeal to the Court of Appeals for the First Circuit brought up only questions of law.

The language quoted by the petitioner at page 33 of the petition is actually a quotation by the Court of Appeals from the opinion of the Supreme Court of Puerto Rico. The full quote from the Court of Appeals' opinion is as follows:

> "We do not undertake to express an opinion as to the reasonableness of the charges. This issue was correctly and adequately dealt with in the opinion of the Supreme Court which points out that: 'The first cause of action was upon the theory of an account stated and agreed upon, and if the plaintiffs-appellees were right, no question of the reasonableness of the services could arise in the Court below or in this appeal. The sole question would then be as to whether or not there was such an agreement or perhaps whether there could be such an agreement and other matters relating to the inclusion and exclusion of evidence. The second cause of action was abandoned and hence all questions as to the reasonableness of the services disappeared from the case' (84 Fed. 2d 894, 896)."

Certainly *Bengoechea Macias* cannot be cited for the proposition that the law of Puerto Rico prohibits a court of that Commonwealth from inquiring into the question of whether fraud or overreaching might require a court to refuse to enforce a retainer contract. In *Bengoechia Macias*, it was found as a fact that the client had agreed to the fee account. Under such circumstances, of course, no question of reasonableness would arise in any jurisdiction.

It seems clear that not only was no question of federal-state law application raised below in the *Shiya* case but it could not have been since there is no actual conflict amongst the state courts, nor between state and federal courts on the subject of interpretation of contingent retainers.

All jurisdictions examine lawyers' contingent fee contracts against various verbal formula, each of which, however, are the subtantial equivalent of each other. The Circuits are not in conflict. The Second Circuit generally has not and did not in the *Shiya* case depart from the uniform law on this matter.

POINT III

There is no conflict between the law of New York and "Federal law" with regard to the interpretation and construction of retainers said to be ambiguous.

As with the petitioner's claim that the law of New York differs from general law applied by the courts below in construing the Shiya contingent retainer with regard to the duty of a court to examine a retainer to determine if unconscionable or unreasonable, so the petitioner's assertion that the law applied by the courts below is contrary to the law of New York with regard to the construction of an ambiguous retainer contract is also invalid. Actually, the general law applied by the courts below and the law of New York are the same on the latter point as well as on the former.

As a primary rule of contract construction, the term "ambiguity" must first be defined. Ambiguity may mean there was no meeting of the minds at all (Restatement of Contracts Sec. 32) which requires a denial of specific performance. However, where there has been a meeting of the minds is conceded as in the *Shiya* case, but the words used in the retainer are said to have more than one meaning, the courts may inquire into the circumstances both prior to and contemporaneous with the making of the contract (Restatement of Contracts, Sec. 230). It is only after the application of the primary standards of interpretation, providing the meaning to be given an agreement still remains uncertain, then so-called secondary rules of

construction apply. The rule that the contract is to be construed against the party who made it is a secondary rule. Such interpretative rules apply with respect to all contracts including attorneys' contingent fee retainers. For instance, in the leading New York case of *Seligson, Morris* v. *Fairbanks Whitney Corp.*, 22 App. Div. 2d 625 (1965), the plaintiff law firm recovered a jury verdict of $228,000 for legal services under a retainer which it prepared. A question arose whether the retainer related to property owned by the defendant's subsidiary Pratt and Whitney. The defendants contended that if the contingent percentage related to the property of such subsidiary, it would give to the plaintiff lawyers an extraordinary and disproportionate award. As in the *Shiya* case, there was little dispute in the *Seligson, Morris* case over the nature of the services rendered or the great value of the benefits derived by the client. The trial court refused to charge in *Seligson* that any ambiguity in the retainer should be construed against the plaintiff lawyer who drafted the contract and left to the jury the issue whether the retainer covered the Pratt & Whitney property. The Appellate Division in affirming explained the meaning of the secondary rule of interpretation that ambiguous contracts should be construed strongly against the drafter in the following language (22 A. D. 2d 625, 632):

> "The jury knew, as the trial court commented, that all the persons who participated in the making of the written agreement were sophisticated persons with extensive business, and some with legal, training. Moreover, the written agreement was one drafted especially for the occasion; it consisted of nothing more than two typewritten letter-size pages; it had none of the qualities associated with contracts of adhesion such as a printed form lease, insurance policy, or bill of lading, where the parties are not of equal bargaining power, where much of the language used consists of

special words of art whose meaning is known only to specialists in the field, and where the length and format of the documents is such that the unsophisticated are likely to be trapped into undertaking or subjecting themselves to obligations never intended. The operative language has been described and quoted and is quite ordinary. Under the circumstances the refusal to charge on the particular standard with respect to ambiguity was without prejudice and it is unlikely that if the request had been granted the result would have been changed."

and again at page 633:

"The bald ambiguity instruction to the jury would have given the jury no significant or meaningful standard."

The holding in *Seligson, Morris* is peculiarly applicable in the *Shiya* case. As pointed out in the opinion of the Court of Appeals, *Shiya* v. *National Committee of Gibran*, 381 F. 2d 602, 1967, "The negotiations which preceded the November 1, 1956 retainer occurred over more than four years and are evidenced by many documents and some oral testimony, none of which is challenged".

In spite of the biased statement of facts in the petition, statements almost identical to those made in petitioner's briefs below, the true facts may be found in the informal opinions of Judge Ryan (10a; 112b), the findings of fact (132a) and in the opinion of the Court of Appeals.

As in *Seligson, Morris*, the *1953* retainer was carefully negotiated between Joseph Rahme, a Lebanese lawyer (17b) as President of the Committee through his attorney-in-fact, Dr. Basile, a well known and well respected New York medical doctor of Lebanese origin (15b-131b) and Mr. Shiya. The Lebanese Consul in New York a Mr.

Shebea also participated in these negotiations. Mr. Shiya had been legal consultant to the Consulate (51b).

In another case decided by an appellate court in the State of New York, *Matter of Schanger*, 7 A. D. 2d 275, affirmed 8 N. Y. 2d 972, without opinion (1960), the Court was required to determine the reasonableness of a legal fee contract which provided for return of 15% of the gross estate. This contract had been made after the attorney client relationship was created. The court recognized the general statement in the absence of any proof of fraud, the courts may not interfere with the contract of an adult competent client (7 A. D. 2d 277). However, since petitioner was illiterate and proved overreaching by the lawyer, then the retainer may be considered unconscionable and the burden of proving the retainer fair and reasonable and that it was fully understood by the client is on the attorney. In the *Schanger* case, the Appellate Division fixed a fee on *quantum meruit*.

The petitioner's attempt to prove fraud or overreaching on the trial failed. The respondent, on the other hand, proved extensive negotiations by mature, knowledgeable parties before any retainer was signed. The attorney-in-fact for the respondent committee, Dr. Basile, as pointed out in the Court of Appeals opinion, prior to retaining Shiya, "consulted 10 to 12 law firms including Shiya's * * * Thereafter while in Lebanon during July and August, 1953, Basile discussed hiring of a lawyer with Rahme who told Dr. Basile that Shiya's proposal was too high and instructed Basile to interview additional New York lawyers. Upon his return to the United States, Basile contacted 7 or 8 more law firms. Unable to locate a competent lawyer who would better Shiya's terms, Basile on December 3rd, 1953 retained Shiya * * *".

The original retainer provided for "35% of all sums recovered" and required that Shiya pay all expenses. The

committee would not have hired Shiya under any other circumstances. Three years later, when the committee realized that the renewal royalties from Gibran's works might amount to more than had ever been expected at the time the original retainer was signed and due to the pressure put upon Shiya by his client of long standing, the Lebanese Consul General, Mr. Shiya "with great reluctance, finally assented to Shebea's (Lebanese Consul General) suggestion of a fee equal to 25% of the total recovery." The negotiations were conducted in Arabic, which was fully understood by both Basile and by Rahme. Because of the extensive negotiations both prior to and contemporaneous with the retainer agreements of both 1953 and 1956, which excluded any possibility of overreaching, it became very obvious that the secondary rule of construction concerning interpretation of attorneys' contracts against the maker has little application to a decision as to the meaning of such retainer.

The law of New York was repeated in *Unterberg* v. *Therm-air Mfg. Co. Inc.*, 14 N. Y. 2d 859 (1964), reversing 20 A. D. 2d 260 (First Department). In the *Unterberg* case, the Appellate Division by a three to two opinion found for the client but the New York Court of Appeals reversed for the reasons stated in the dissenting opinion. The dissenting opinion in the Appellate Division at 20 App. Div. 2d 260, 263, held that if a contemporaneous underwriting agreement were to affect the obligation of the defendant to a plaintiff lawyer, then the agreement should have expressly so stated and found, "There is no reason why they (plaintiff lawyers) are not entitled to their fee."

In the face of these cases, it is incongruous for the petitioner to imply that under New York law if a retainer is ambiguous then regardless of the circumstances the retainer must always be interpreted in favor of the client.

In *McAvoy* v. *Schramme,* 238 App. Div. 225 (1933), affirmed 263 N. Y. 648 (1933, no opinion), the Appellate

Division affirmed a case in which the trial court had refused to charge a jury that if a contract of retainer is capable of more than one construction, it is to be construed "most favorable, most strongly, in favor of the client". The New York Appellate Division in the *McAvoy* case examined the retainer in exactly the same way as did the Court of Appeals in the *Shiya* case and decided that the question of the meaning of the words in the retainer (238 App. Div. 228), "depends upon an interpretation of the contract of retainer, particularly with respect to the intention of the parties as disclosed by its terms in the light of the surrounding facts and circumstances". And as did the Court of Appeals in the *Shiya* case, so in the *McAvoy* case, the Appellate Division held that since the trial Judge and the Appellate Division had before them the evidence of the work done by the plaintiff lawyer, that they would hold that the plaintiff lawyer was entitled to a jury finding in his favor.

All of these New York cases agree with the general rule that a court, in determining what the parties to a contingent retainer meant, should first examine all circumstances surrounding the making of such retainer to resolve, if possible, any ambiguity in the retainer. The secondary rule re: strict construction against the maker is only used when it is not possible to resolve the ambiguity.

A study of the opinion of the Court of Appeals shows that the court followed the accepted rules of construction. It first examined the negotiations preliminary to the 1956 retainer and pointed out that such negotiations included the 1953 retainer and many letters and documents "none of which is challenged" (App. 3).

The Court of Appeals referred to the original (1953) retainer as providing for "* * * 35% of all sums recovered * * *". The opinion then examined the negotiations between the 1953 and 1956 retainers to the point where Mr. Shiya "with great reluctance finally assented" to the

suggestion of the Lebanese Consul General of "a fee equal to twenty-five per cent of the total recovery".

The Court of Appeals then observed that the petitioner Committee refused to sign the September 1956 letter because it gave Shiya "25% of the moneys that are due or that shall become due" (App. 10).

Because of the many "surrounding circumtsances" the opinion found the 1956 retainer was not "totally lacking in ambiguity". Nevertheless, a full examination of these "surrounding circumstances", in the nature of the oral testimony, at trial, by Shiya and Basile, as well as the documents and letters involved led the Court of Appeals to decide that the "meaning and intent" of the parties "at the time of the November 1, 1956 retainer" was that Mr. Shiya receive 25% of all renewal royalties (App. 14). This being the true understanding of the parties, the secondary rule of strict construction against the maker of a contract became inapplicable for the "ambiguity" had been resolved.

The New York cases cited by the petitioner do not hold contrary to the general law concerning the construction of ambiguous retainers. In *Mackey* v. *Passaic Stone Co. Inc.*, 36 N.Y.S. 2d 232, Queens County, Supreme Court, 1942, and cited by petitioner, page 21, note 19, the Court held that where an attorney, who was hired on a 35% contingent retainer after becoming aware that the person he was hired to sue had a valid counterclaim and thereafter did not change the terms of the retainer, was entitled to only 35% of the difference between the amount he recovered by suit and the successful counterclaim. In a 3 to 2 affirmance, 266 App. Div. 690, the Court pointed out that contrary to the statement contained in the opinion of the trial judge, the record showed that the plaintiff lawyer had full knowledge that his clients had failed to pay for materials when he prepared the retainer, and, therefore, must have understood that when he used the words

"moneys recovered" as the basis of the computation of his fee, he assumed the risk that his recovery would be diminished by a counterclaim. This was affirmed 292 N. Y. 525 (1944). Thus in *Mackey* there was no holding that once a retainer is found ambiguous the client must always win. On the other hand, the *Mackey* case required a full examination of the circumstances surrounding the making of the contract. The holdings in the New York cases of course, do not differ from the general rules set out in the 7 C.J.S. Sec. 186 (p. 1062).

The petition does not question that determination of reasonableness or conscionability of any contract must be tested by the situation existing at the time the contract was made and not at a future time affected by the happening of events which were unforeseeable at the time the contract was made.

In the *Shiya* case, when the petitioner agreed to a fee of 35% of all sums recovered on the renewal copyrights in 1953 the chances that the renewal copyright would be of great future value were remote and could not have been in the minds of either Mr. Shiya, Dr. Basile or Mr. Rahme. The petitioner seems not to question that when the 1953 retainer was made it called for a "reasonable" fee regardless of whatever connotation be given to the word "reasonable". When the petitioner realized that the wholly unforeseen sale of Gibran's books between 1953 and 1956 would result in an increase of the value of the total renewal royalties, it successfully induced Shiya to accept 25% of the "total recovery". Even in 1956, however, the parties did not foresee that future sale of Gibran's works would make the renewal royalties of great value.

As Judge Ryan pointed out to the attorney for the petitioner on the trial, when that attorney pleaded that the fee might reach "six or seven or eight hundred thousand",

> "The Court: The trouble, counselor, is that when this suit started nobody had any idea, not even the

remotest idea, that the royalties would amount to such a large sum as they did.

Mr. Sams: That is absolutely true, your Honor." (117b)

Again at the very opening of the trial, the petitioner's attorney made a statement which showed that he fully appreciated this point. Mr. Sams in his opening remarks to Judge Ryan said (14b),

> "it very well may have been that, now that we know the true value of these copyrights, perhaps $135,000, $120,000 may have been a reasonable fee. We don't know that, we have to consider what the parties considered at the time they made their contracts, because the contracts are what will govern."

The other New York cases cited by petitioner (p. 21, note 19) agree with the same general law.

In *Hawke* v. *Dorf*, 148 App. Div. 326 (1911), the Court refused to follow the construction urged by the plaintiff attorney since to do so would result in a fee in spite of the fact that his efforts were fruitless. The court decided, after examining the retainer and the surrounding circumstances that the "reasonable construction" was in the client's favor.

In *Samuels* v. *Simpson*, 144 App. Div. 466 (1911), the Court refused to follow the reasoning of the plaintiff attorney as to the construction of the language which was hopelessly doubtful since the construction urged by the lawyer would result in his "* * * gain by defeating the bequest to his client".

In *In re Smith's Will*, 11 Misc. 2d 170 (1958), the Court construed a retainer against a plaintiff lawyer, who failed to testify and who was the draftsman of his own mother's Will and in that Will disregarded a desire of his mother to always provide a home for his brother and sisters.

In the case of *In re Vaupel's Estate,* 37 N.Y.S. 2d 853, affirmed 266 App. Div. 723 (1942), the court construed an oral retainer against an attorney when it was unfair on its face and because of the fact that the client had no experience in business nor in litigation, and found that the transaction ". . . does not meet the standard of conduct required by a member of the bar" (37 N.Y.S. 2d 856).

In *Race* v. *Harris,* 246 App. Div. 367 (1936), the retainer was drawn by an attorney of "wide experience" "* * * dealing with a colored minister's elderly widow, who was inexperienced in legal affairs" but since the retainer did not "shock the conscience of the court" was not completely set aside.

The opinions in the *Unterberg* and *McAvoy* cases indicate that the New York courts follow the traditional primary standards of interpretation in deciding an issue involving an "ambiguous" retainer. The so-called rule of strict construction against the maker is but a secondary rule (Restatement of Contracts 336). This rule of strict construction is invoked in the New York courts as it is in all other jurisdictions where the parties do not deal at arm's length or as a make-weight to reject an unreasonable construction of the retainer urged by the attorney plaintiff.

The federal cases cited at page 29 of the petition fully support the proposition that federal and state law on this question is similar.

In *Vans Agnew* v. *Fort Myers Drainage Dist.,* 69 F. (2d) 244 (5 Cir. 1934), the court adopted a construction in accord with the "well settled" Florida law and added, 246, "Resort to the rule construing a contract against the party who chose the language of it hardly is needed to justify the conclusion" (of the court).

The case of *Ridge* v. *Healy,* 251 Fed. 798 (8 Cir. 1918), involved a retainer entered into by a lawyer with a widow after the attorney-client relationship had been established

and after "extended social intercourse". The court set the contract aside, characterizing it is as "unfair", "unequitable" and "unconscionable" but only after a long opinion carefully exploring all surrounding circumstances.

Even Judge Hays in his dissent in the Court of Appeals never indicated that it was his opinion that the fee was unreasonable or unconscionable, nor did Judge Hays accuse the majority of refusing to inquire into the "reasonableness" of the contract.

It is quite clear, that the law of the State of New York is no different than the law generally applied to attorneys' retainers with regard to interpretation of ambiguous terms. Because the contract is ambiguous, does not mean that the attorney must lose in his attempt to enforce the contract. The surrounding circumstances must first be examined, as was done in the opinion of the Court of Appeals in this case, to decide whether under primary rules of construction the ambiguity can be resolved. If the reasonable interpretation favors the lawyer then the ambiguity has been resolved and no secondary rules of construction come into play.

POINT IV

Contrary to the rules of this Court, the petitioner merely seeks a review of the opinion of the Court of Appeals on its interpretation of the testimony, letters and documents which make up the surrounding circumstances of the 1956 retainer.

The negotiations leading to the retainer and the retainer itself have been intensively studied by the courts below. There is no reason for re-examination by this Court.

A.

The trial and results in the District Court.

Chief Judge Ryan had before him a long affidavit of services prepared by Shiya in support of his original peti-

tion under New York State Judiciary Law 475 (1b, 46b). This affidavit was considered by the District Judge in reaching his decision which involved deciding facts and law. There was no objection made to such procedure by the trial counsel for the petitioner.

The first act, preliminary to the trial below, was a stipulation made by petitioner's trial counsel that Mr. Shiya's fees need not be determined upon *quantum meruit* (2b) but were to be determined solely upon the construction of the November 1, 1956 retainer (p. 9, Pet. brief Dist. Ct.). No issue was raised by petitioner in any court that the 1956 retainer was "unreasonable" when made. Indeed the petitioner makes no claim in this Court that either the 1953 or 1956 retainer was unreasonable at the time each was made.

The outline of the evidence presented at the trial is contained in pages 3 through 21 of the respondent's brief in the Court of Appeals and need not be repeated at length here. Obviously respondent disagrees with the slanted outline of the evidence in the petition but does not believe a re-argument of these factual questions is germane. The decision of the Court of Appeals was the final determination on these issues of fact.

Mr. Shiya's legal work in the Gibran litigation was described by Judge Ryan (123b) as follows:

> "I think a splendid job here was done by this attorney, a splendid job. He took a case that apparently nobody wanted to handle. Apparently, the Town itself did not want to advance any money for it, and they were in receipt of moneys * * * They did not even want to spend any of that so they did not have much faith in their ultimate success."

Although the comments, findings of fact and informal opinion of Judge Ryan and the opinion of the Court of

Appeals made reference to the facts as found by impartial *fori*, the petitioner continues, as he did in the District Court and in the Court of Appeals, to ignore the court's findings and attempts to create a prejudice in this Court by an inaccurate biased recitation of facts. For instance, the petitioner continues to assert that its own attorney-in-fact, Dr. Basile, did not inform the Rahme Committee of the events concerning the royalties during the 1960-1964 period and implies that this is some evidence of overreaching. But the petitioner does not advise this Court that several "committees" claimed a right to the Gibran royalties during the 1961-1964 period. At one time, three individuals claimed the right to the Gibran royalties as "President" of the true Committee. Indeed, individuals in Becharre urged Dr. Basile, the committee's attorney-in-fact not to send any money to the committees in view of the "gun play" that was going on in Becharre amongst the persons who were fighting for the Gibran royalties (48b-49b).

The petitioner further ignores the fact that Mr. Shiya (63b) and Dr. Basile (103b) both testified that the retainer by which Dr. Basile hired Mr. Shiya was to relate to "the full term of the renewal copyrights and 25 or 30 per cent of the whole amount."

It is also of some importance to note that even while the case was on trial in the District Court of New York, the question who was President of the "committee" was still the subject of doubt in Lebanon for Judge Ryan received a cable from a "lawyer Meskawy" which originated in Lebanon asserting that the Rahme committee was illegal. Indeed, the evidence of the continued battling amongst the various persons alleged at various times to be the president of the committee, induced Judge Ryan to order that the funds being held by the Southern District Court be paid directly to the Town of Becharre in care of the Lebanese Ambassador (113b).

After hearing the evidence of the duplicity of the various Gibran Committees and the handling of the royalties, Judge Ryan said (113b):

> "The Court: Well, I think that it is a tragedy that this controversy has arisen as to how this money should be spent which Gibran intended should be used for charitable purposes in connection with his native village. It might (sic) presumptuous on my part to even suggest it, but it seems to me that this is a matter in which the government perhaps might well step in and see that the fund is administered to accomplish the purpose that the testator intended.
>
> My own reaction is that when we determine what the fee is to be which is to be allowed to the petitioner herein, that any other funds which are in control of the Court be paid directly to the Town of Becharry in care of the Ambassador of Lebanon, who has been recognized as the representative of that country here in the United States of America, and let him determine who should get it rather than trifling around with these committees."

Indeed, the only reason the Government of Lebanon has any present interest in this petition is because of this action by Judge Ryan (November 22, 1966).

Although in the petition, the petitioner accuses the courts below of having paid little attention to "the September agreement and focused instead on the November, 1956 letter" (Petition, p. 31) in its brief in the District Court, the petitioner stated that the agreement of November 1st, 1956 has always been considered by the committee as the sole binding contract (pp. 16, 17, petitioner's brief, District Court). The attitude of the petitioner in the District Court was that neither the 1953 nor the 1956 retainer was ambiguous (See 36, petitioner's brief, District Court), and that the 1956 retainer was a valid binding contract freely

entered into by both parties (p. 41, committee's brief in District Court).

However, in the Court of Appeals, the petitioner (p. 21, petitioner's brief, Court of Appeals) completely changed its theory. The first five questions which the petitioner requested the Court of Appeals to inquire into had to do with the failure of the District Court to consider "the complete exchange of letters," alleged errors in interpretation, and construction of the November 1st, 1956 letter; the failure to "consider all circumstances of the preliminary negotiations" and a failure "to consider all circumstances of the subsequent conduct of the parties."

The opinion of the Court of Appeals indicates that that Court did everything which the petitioner's brief asked it to do. It first examined the negotiations prior to the November, 1956 retainer; found that contrary to Judge Ryan's holding the November, 1956 retainer was not entirely free of ambiguity and as the petitioner requested, examined the "surrounding circumstances" and then held that Judge Ryan's interpretation of the essential meaning of the November, 1956 contract was correct.

It is quite apparent that the petitioner will change its position from court to court to suit immediate needs. In the District Court, it asserted that the only contract which was binding on the parties was the November, 1956 retainer, and that this was unambiguous. When Judge Ryan held against them on this very point, it changed its approach in the Court of Appeals and took the opposite position that the November, 1956 contract was ambiguous and that surrounding circumstances should be examined. When the Court of Appeals performed as the petitioner wished and did examine the surrounding circumstances and nevertheless found in favor of Mr. Shiya, it now would convince this Court that the problems involved in the lower courts were not merely the usual interpretation of the facts and law controlling a retainer but a new issue specially cre-

ated and tailored for this Court, viz.: a theory that the District Court refused to follow state law as demanded by petitioner and used an inapplicable and incorrect federal law. This newest attitude is obviously created solely to manufacture an issue in the hope that this Court can be convinced an issue of national importance exists.

The petitioner's unembarrassed alteration of position from court to court is evidenced also by its reference to the ease of the defense of the committee's position by Mr. Shiya during the 14 years that the Gibran litigation was before the courts. At page 6, note 4, of the petition, it states that to demonstrate the unreasonableness of the 1956 retainer it should have been given the right to show to the District Court the simplicity of Mr. Shiya's defense of the petitioner in the *Gibran* case. The record is bare of any attempt by the experienced trial lawyer for the committee to make any such request during trial. To decide the case of *Gibran* v. *The National Committee of Gibran*, 153 Fed. Sup. 854 (1957), required a 5-page opinion by Judge Weinfeld, in which it was necessary to distinguish the *Gibran* case from the case of *Silverman* v. *Sunrise Pictures Corp.*, 273 F. 909 (2 Cir. 1921). In the *Gibran* case, the administrators c.t.a. relied heavily on the *Silverman* case as a holding contrary to the position of the National Committee in the *Gibran* case. The administrators c.t.a. thought enough of their position in reliance on the *Silverman* case to appeal to the Court of Appeals, which in an opinion of Judge Learned Hand affirmed at 255 F. 2d 121 (1958), and indeed, sought certiorari in this Court on the basis of an alleged conflict between the *Gibran* case and the *Silverman* case, cert. den. 358 U. S. 828 (1958).

As pointed out in the brief of the respondent Shiya in the Court of Appeals, the so-called September, 1956 letter was never signed by Mr. Rahme nor by anyone and the fact that the petitioner did not believe its importance sufficient enough to put it in evidence at the trial until after

Judge Ryan had indicated what his holding was going to be was brought to the attention of the Court of Appeals. The amoebic approach by the petitioner did bear some fruit, however, for it seemingly convinced Judge Hays that Mr. Shiya had failed to assert any claim to the renewed royalties paid to the committee after termination of the Surrogate's Court proceedings. As a matter of fact, Mr. Shiya never knew these payments were being made and presumed that the publisher would not make any payments to the committee because of the pending tax problem and doubt as to the identity of the true committee president, since the Lebanese courts had held that a man named Tok not Rahme was the then true president of the committee. Mr. Shiya so testifed and this was brought out in the briefs on appeal (90b-92b).

Indeed, Judge Hays also in his dissenting opinion mistakenly referred to the postscript on the letter of September 8th, 1956 from Dr. Basile to Rahme as being made by Basile, whereas both parties understood and agreed that this was written by someone in Lebanon as a note on Dr. Basile's letter. No one ever claimed that this was a postscript made by Dr. Basile. The scatter shot methods used by the petitioner did succeed in effecting a partially successful smoke screen with Judge Hays.

The reference by the petitioner to the alleged ineptness of Mr. Shiya with regard to the "tax question" is another of the continued attempts begun in the District Court to blacken Mr. Shiya's name. The testimony on this point was very clear. Mr. Shiya testified without contradiction (85b) that this tax problem was created not by him but by the attorneys for the administrators c.t.a. who feared that their clients would be taxed if the funds remained in their clients' hands for more than a year (98b). Indeed, Mr. Shiya attempted to convince District Judge Weinfeld not to send the funds back through the Surrogate's Court (94b) and appealed from Judge Weinfeld's refusal to do so (95b).

The petitioner had a full opportunity to prove the factual allegations made in the petition on the trial but was unable to produce any evidence to support such claims. The findings of fact and the conclusions of law in the courts below are a complete answer to the petitioner's unsupported assertions.

Conclusion

The writ of certiorari should be denied. There was no question of competing federal-state interests in the courts below. The questions have been manufactured for this Court's interest in an attempt to comply with this Court's rules.

There is no real difference between the general law on the subject of construction of contingent retainers applied in federal and state courts or between the law applied in the courts of various states.

The petitioner makes no claim that the Shiya retainer was unconscionable or unreasonable when made. At that time a 25% interest in the Gibran renewal royalties was never expected to reach its present value. The test of reasonableness of such contracts is made at the time the retainer is made and is not affected by unforeseen, unpredictable future events.

Respectfully submitted,

JOSEPH M. CUNNINGHAM,
Attorney for George G. Shiya,
Respondent,
67 Wall Street,
New York, N. Y. 10005.

PHILIP G. REILLY,
Counsel,
217 Broadway,
New York, N. Y. 10007.